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No. 91-

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE CITY OF NEW YORK, DEPARTMENT OF
PERSONNEL, JUAN ORTIZ, AND NICHOLAS
LA PORTE, JR.,

Petitioners,
-against-

DR. JUDITH PIESCO,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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August 28, 1991.

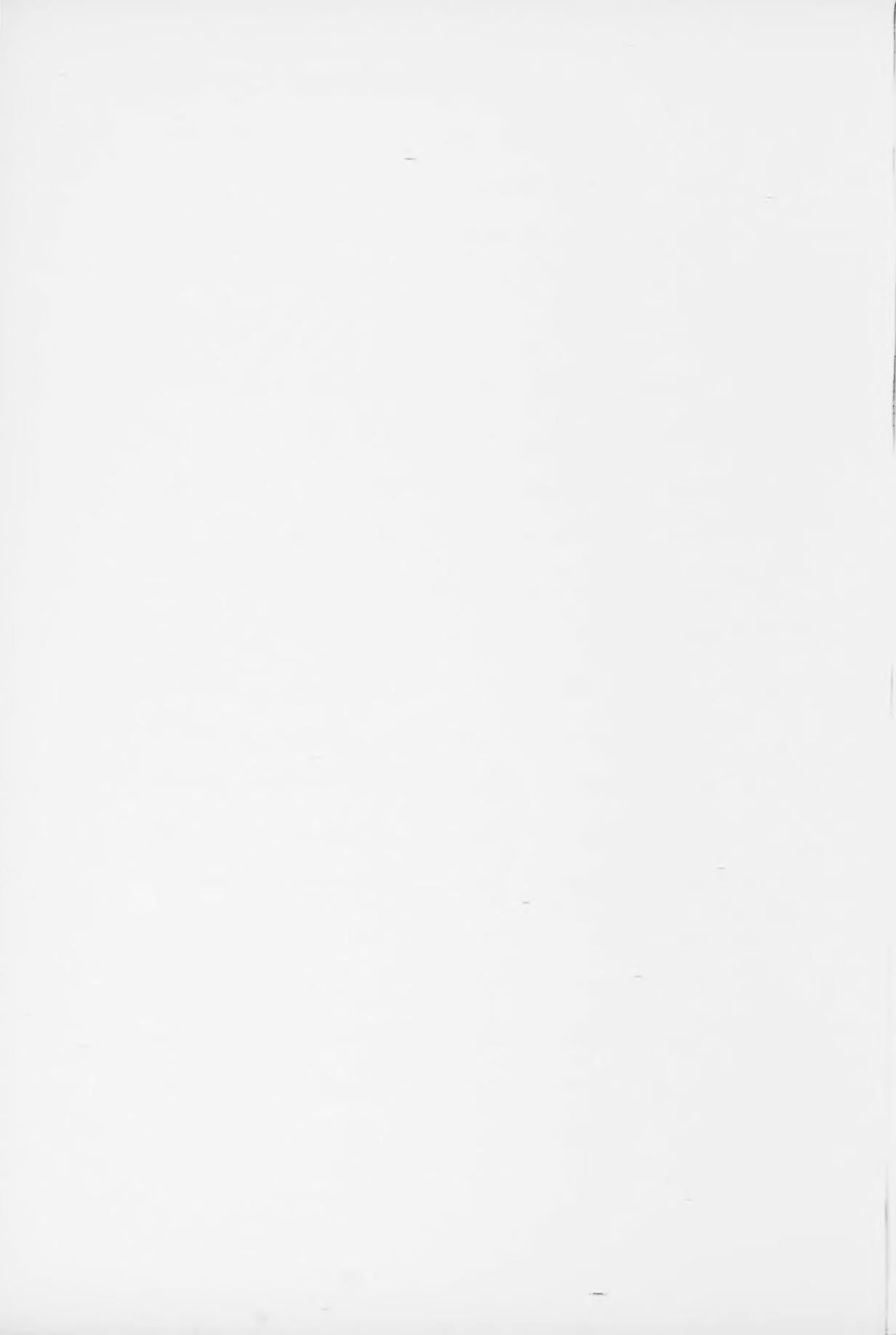
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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit erred in effectively conferring absolute first amendment protection to legislative testimony given by high-ranking government officials notwithstanding its acknowledgement that under Pickering v. Board of Education, 391 U.S. 563 (1968), the Court must balance the employee's interest in making the comments against the government's interest in ensuring its efficient operations?

2. Whether the Court's holding requiring the Personnel Department to submit evidence of actual disruption to the agency's functioning resulting from comments made by the Deputy Personnel Director before a legislative hearing that a "moron" or a "functional illiterate" could pass the police civil service test is inconsistent with Connick v. Myers, 461 U.S. 138 (1983), where this



Court held that a public employer is not required to wait until "the disruption of working relationships is manifest before taking action"?

3. By failing to consider the specific facts of this case in applying the qualified immunity doctrine, did the Court of Appeals apply an immunity test which is inconsistent with the test formulated and applied by other Circuits in first amendment employee discipline cases?



PARTIES

Petitioners, the defendants below, are the Department of Personnel of City of New York, Juan Ortiz, individually and in his capacity as Personnel Director, and Nicholas LaPorte, Jr., individually and in his capacity as Deputy Personnel Director.

Respondent, plaintiff below, is Dr. Judith Piesco.



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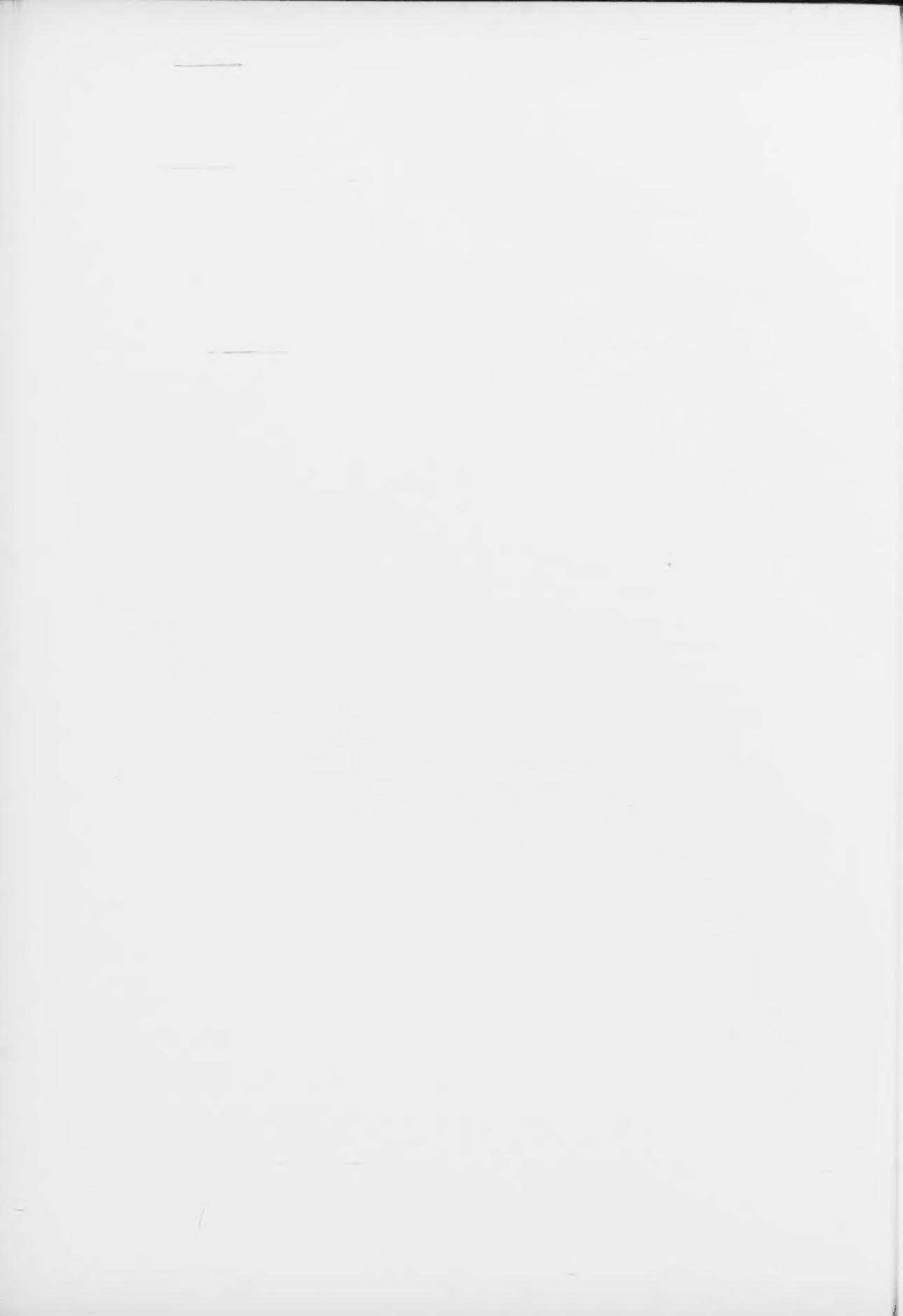
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioners, the Department of Personnel of the City of New York, Juan Ortiz and Nicholas LaPorte, Jr., respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in



this action on June 3, 1991, which reversed so much of the judgment of the United States District Court for the Southern District of New York (Martin, D.C.J.), entered December 25, 1990, as dismissed respondent's first amendment claim.

OPINIONS BELOW

The opinion of the Court of Appeals dated June 3, 1991 is reported at 933 F.2d 1149 (2d Cir., 1991). A copy is reprinted in the Appendix to this Petition at page 1. The opinion of the United States District Court for the Southern District of New York (Martin, D.C.J.), dated December 18, 1990, is reported at 753 F. Supp. 468 (S.D.N.Y., 1990). A copy is reprinted in the Appendix at page 56.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered June 3,



1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition has been filed within the time allowed by law.

STATEMENT OF THE CASE

(1)

Respondent, Judith Piesco, was terminated as Deputy Personnel Director for Examinations for the New York City Department of Personnel after she testified at a State Senate Committee hearing that a "moron" or a "functional illiterate" could pass Examination No. 4061 for appointment to the position of police officer.

As Deputy Personnel Director, a position Piesco held on a provisional basis, she was one of the highest ranked officials in the Department. Only petitioner Juan Ortiz, the Personnel Director, and petitioner Nicholas LaPorte, Jr., the First Deputy Personnel Director, ranked above her



(CA136d, CA140).¹ Piesco was responsible for the development, preparation, evaluation and administration of all civil service examinations for the City of New York. She was also responsible for advising Ortiz, LaPorte and other City officials concerning such matters (CA6, CA92-93).

One of the tests developed and administered under Piesco's supervision was Examination No. 4061 for appointment to the position of police officer (CA340). In February 1985, Piesco, together with Ortiz and LaPorte, met with Police Department officials to establish a passing grade for that examination (CA39 ¶7; CA95-97;

¹ Unless otherwise indicated, numbers in parentheses preceded by the letters "CA" refer to pages of the joint Appendix in the Court of Appeals. Numbers preceded by the letter "A" refer to pages of the Appendix to this petition.



CA144-145). Piesco advocated a passing score of 89% while the Police Department advocated a score of 82% (CA95-96). Prior to this meeting, Ortiz and Piesco had discussed his concerns that a 89% passing grade would have a disparate impact on minorities and that the examination could be challenged on that ground (CA96-97). At the meeting, a passing grade of 85% was established. To achieve this grade, a candidate had to answer correctly 119 of the test's 140 questions (CA335). To achieve the passing grade advocated by Piesco (89%), a candidate would be required to answer 125 questions correctly (CA335). Thus, there was a difference of only six correct questions between the passing grade advocated by Piesco and the score which was established.



(2)

In June 1985, Piesco, together with Ortiz and LaPorte, met with members of the staff of the New York State Senate Committee on Investigations, Taxation, and Government Operations which was conducting a review of Police Department management (CA106). It is undisputed that Piesco indicated at this meeting that a "moron" could pass Examination No. 4061 at the passing grade established by the Department (CA106). The only dispute is whether Piesco or a member of the Senate Committee staff first used the word "moron" (CA106, CA371).

Thereafter, Piesco and Ortiz appeared at a hearing before the State Senate Committee on July 11, 1985. Although Ortiz intended to speak on behalf of the Department as its agency head, the Committee requested that Ortiz allow Piesco



to testify (CA262(c), CA165). The following colloquy then took place (CA166-167):

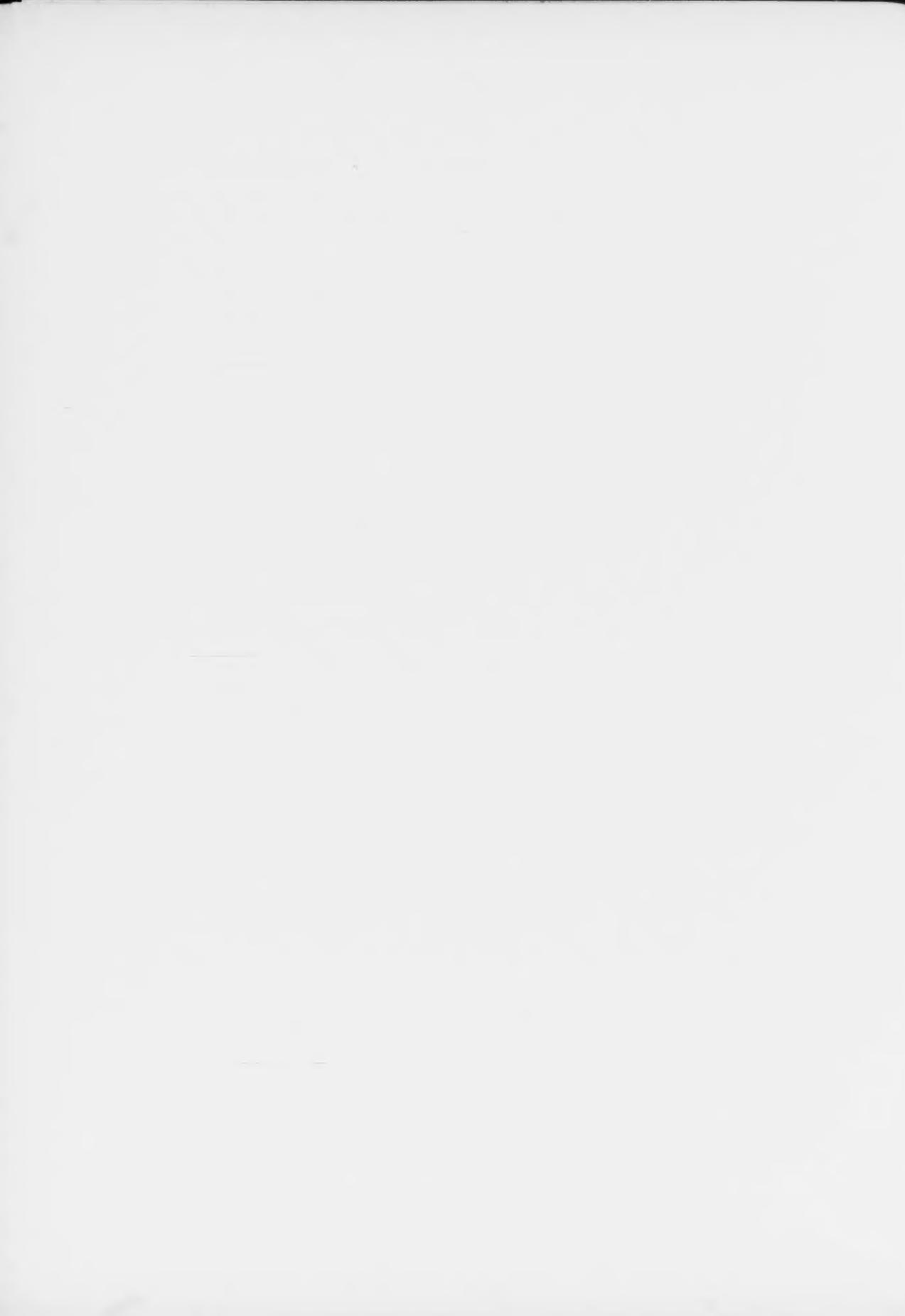
SENATOR GOODMAN: Is it not a fact that under questioning by this commission['s] staff you indicated that the written exam was so easy "that a moron could pass"?

DR. PIESCO:

The conversation that we had was a very informal conversation, and if I used it as characterization, I think it was rather unfortunate[.] I was not obviously aware of the [sic] that the conversation which was informal was in the way of cross-examination. I certainly would have modified my statement merely because the term "moron" is rather offensive and has certain technical meanings. The answer to your question is yes.

* * *

SENATOR GOODMAN: Would a functional illiterate pass the entrance examination to the police academy?



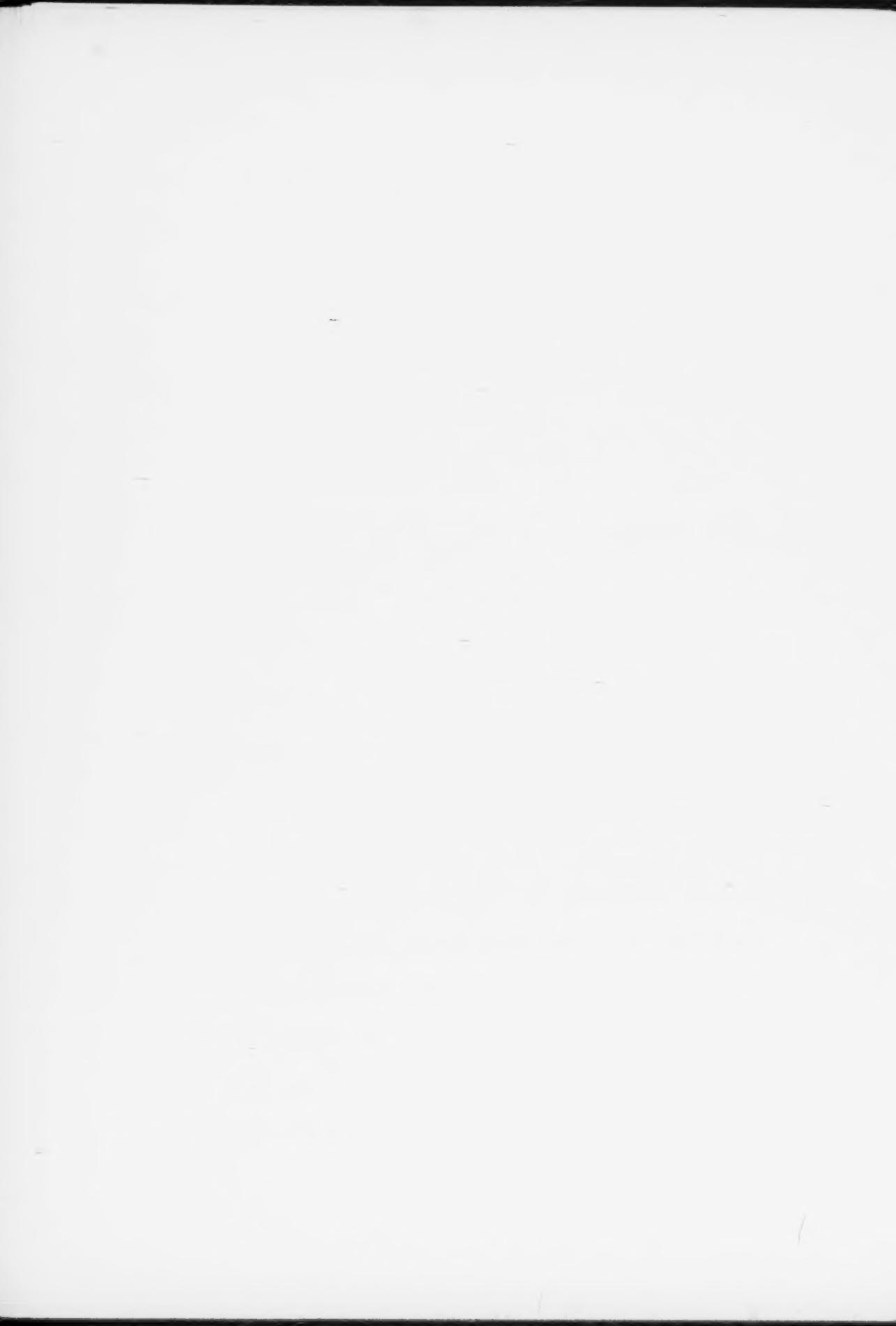
DR. PIESCO: At the pass mark that is set, I would say that it is possible.

SENATOR BERNSTEIN: If a functional illiterate has passed the examination, what would be his chances, [sic] and in your opinion would you say that the chances of such an illiterate being appointed to the Department would be good or minimal?

DR. PIESCO: I don't know what goes on in the selection after we give the list to the Police Department.

(3)

The day after the legislative hearing, Ortiz wrote a memorandum to then - Mayor Koch concerning Piesco's comments at the hearing. Ortiz stated that he considered Piesco's comments to be irresponsible. Ortiz explained that the factors he considered in establishing the pass mark included (1) insuring the quality of police officers; (2) providing the Police Department, over the life of the eligible list, with a sufficient



number of candidates to fulfill its hiring needs; (3) the fact that the examination was only the first of several screening devices before an appointment is made (i.e., candidates must pass a rigorous curriculum at the Police Academy, an eighteen-month probationary period, and medical, psychological, character, and physical testing); and (4) the mandate of Title VII to minimize the disparate impact on minority candidates (CA337). Ortiz also explained that Dr. Landy, the outside consultant hired by the Department to help develop the test, had agreed that a passing grade of 85% was a sound one (CA 337-339).

On July 31, 1985, Ortiz met with Piesco and other members of his staff. This was the first such meeting since the Senate Committee hearing (CA342). It is undisputed that during this meeting, Piesco made certain offensive and insubordinate

comments to Ortiz. After the meeting, Ortiz wrote a memorandum dated August 2, 1985 addressed to Piesco, in which he stated that (CA341):

[because of your behavior at the meeting I had to] discontinue the meeting and ask you to leave my office. This happened immediately after a discussion of your role in the last Police Officer test and your failure to look at the test or the questions before the test was administered. Specifically, without cause or provocation you stood up, pointed your finger at me in an aggressive manner and yelled "you don't know a fucking thing about testing. I am fed up with your bullshit and inaptitude". When I asked you to calm down and conduct yourself in a civil and professional manner you stated "I don't have to do a fucking thing, why don't you fire me?".

Piesco has acknowledged that with the exception of the word "inaptitude", the memorandum was accurate in substance and



in the severity of the language used (CA135).

According to Piesco, although it had been customary for her to meet with Ortiz and LaPorte several times each week, after her testimony, her contact with Ortiz and LaPorte were curtailed (CA112; CA342). Additionally, she was excluded from meetings with other City officials up to the time she was terminated as Deputy Personnel Director on December 27, 1985 (CA112, CA348).²

² Prior to her termination, the New York City Department of Investigation (DOI) investigated Piesco's allegations that she was given poor evaluations and excluded from meetings in retaliation for her testimony (CA369 - 377). DOI concluded that the evaluations were improperly prepared in order to highlight criticisms of Piesco's behavior. After Piesco's discharge, the State Senate Committee on Investigations, Taxation and Government Operations held hearings regarding Piesco's allegations and the Committee concluded that she was discharged "in significant measure" because of her testimony before the Committee.



(4)

Piesco commenced this action pursuant to 42 U.S.C. §1983 alleging, inter alia, that she was given poor performance evaluations, was excluded from meetings and was ultimately dismissed from her position in retaliation for her comments before the State Senate Committee. Piesco alleged that petitioners' actions violated her first amendment and due process rights. Additionally, she interposed pendent state claims.

The District Court Opinion

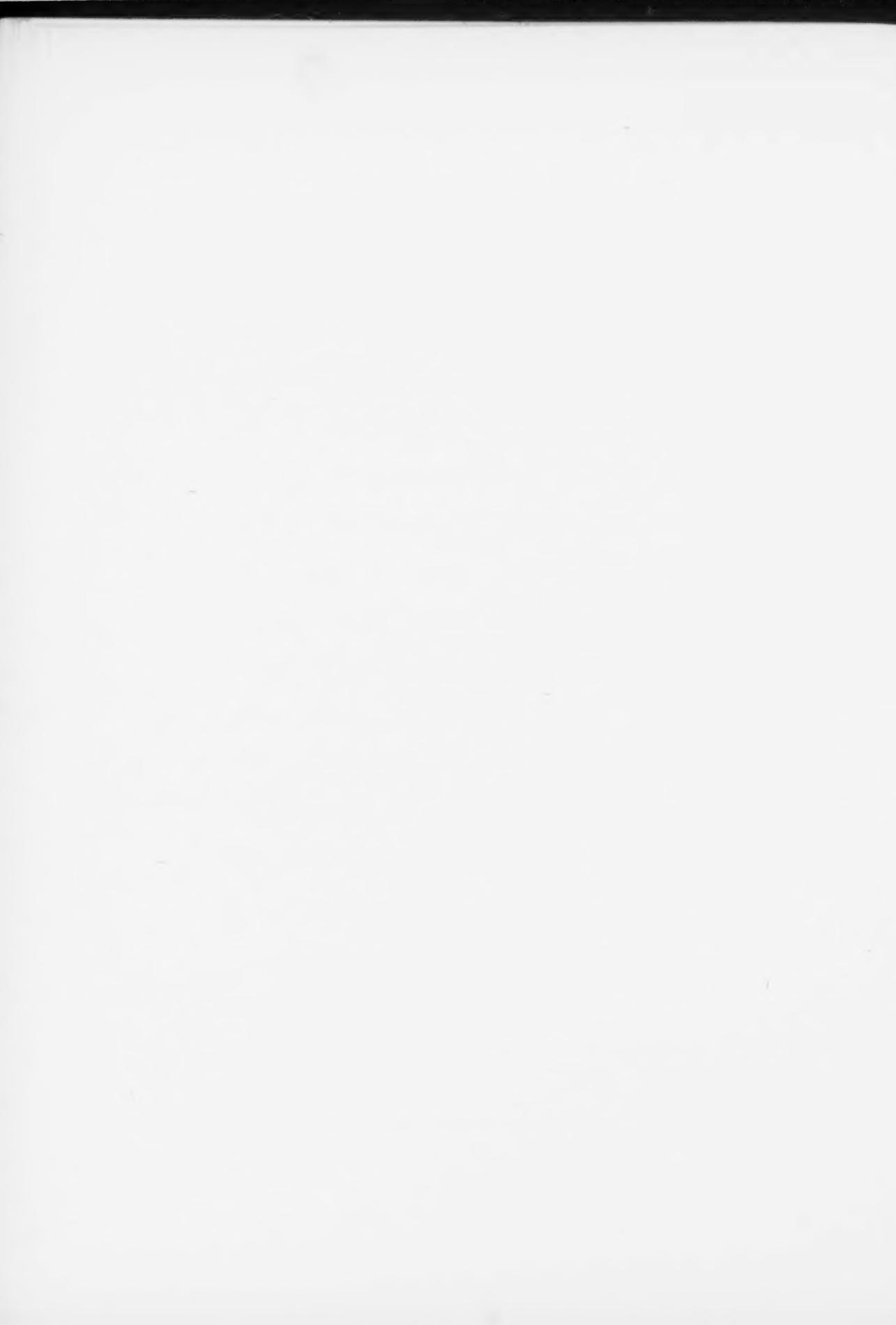
The District Court granted the petitioners' motion for summary judgment and dismissed the complaint in its entirety (A56-102). With respect to Piesco's first amendment claim, the Court applied the balancing test set forth in Pickering v. Board of Education, 391 U.S. 563 (1968), "'to arrive at a balance between the interest



of the [employee] as a citizen in commenting upon matters of public concern and the interest of the State as an employer in promoting the efficiency of the public services it performs through its employees" (A68-69).

The District Court acknowledged that Piesco was required to testify truthfully and that her comments did relate to matters of public concern (A71). The Court noted, however, that although it was possible that a "functional illiterate" could pass the examination, according to Piesco's own affidavit, it was only a theoretical possibility.³ Thus, it was irresponsible for Piesco to testify that it was possible for a

³ According to Piesco, it was possible for a "functional illiterate" to achieve the 85% passing grade through a combination of skill, "sheer luck" and "wild guessing" (CA362).



"functional illiterate" to pass the examination "without amplifying her testimony to indicate how extremely remote that possibility was" (A75-76). Additionally, Plesco's remarks were "inflammatory" in light of the public debate over minority hiring practices (A72-A73).

The District Court further reasoned that Piesco's comments undermined the judgment of her superiors and Police Department officials in establishing the passing grade and that it was "critical" for her to maintain a close working relationship of trust and confidence not only with her superiors but also with other high-level City officials. Thus, the Court concluded that Piesco's statements "so severely undermined the working relationships which were required for an effective performance of her duties that the City's interest as an



employer outweighs Dr. Piesco's speech interest" (A77-83).

Finally, the District Court held that even if the Pickering balance had favored Piesco, her first amendment claim must nevertheless be dismissed against Ortiz and LaPorte on the grounds of qualified immunity (A83-85).

The Court of Appeals Decision

Although the Court of Appeals affirmed the dismissal of Piesco's due process and pendent state claims, it reversed the District Court's dismissal of Piesco's first amendment claim (A1-55). The Court held that the Pickering balance favored Piesco. It reasoned that the District Court had failed to accord sufficient weight to Piesco's speech interest and that (A46-47):

[a] government employee called to testify before a legislative committee about work-related matters would be confronted with a Hobson's



choice. She could either (1) honestly answer the question, in which case, as a matter of law, she could be fired; (2) commit perjury; or (3) refuse to answer the question posed and be held in contempt, ... By offering a government employee the option of jail or unemployment, we would put our imprimatur on chilling speech in a forum where candor is critical to informed decision-making. This we decline to do.

The Court of Appeals also rejected the District Court's reasoning that Piesco, as a high-level City official testifying on a sensitive subject, had an obligation not only to testify truthfully, but also responsibly by elaborating on her testimony (A41-42).

Moreover, the Court of Appeals held that the Pickering balance favored Piesco because the petitioners failed to submit any evidence that Piesco's comments caused actual disruption to the efficient functioning of the agency (A45-47).



Finally, the Court held that Ortiz and LaPorte were not entitled to qualified immunity because it was clear at the time of Piesco's termination that her discharge would be unlawful (A49-53).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has effectively conferred absolute first amendment protection to all legislative testimony given by high-ranking government officials, notwithstanding its acknowledgment that under Pickering v. Board of Education, 391 U.S. 563 (1968), the Court must balance the employee's interest in making the comments against the government's interest in ensuring its efficient operation. This is without precedent.

Furthermore, the Court of Appeals' holding requiring the public employer in this case to submit evidence of actual disruption



to the agency's functioning resulting from the employee's comments is inconsistent with Connick v. Myers, 461 U.S. 138 (1983). Under Connick, an employer is not required to wait until "the disruption of working relationships is manifest before taking action". Although this Court did caution that "a stronger showing may be necessary" in cases where the "employee's speech more substantially involved matters of public concern", this Court has not addressed whether proof of actual disruption is required to make this "stronger showing". The Circuits which have addressed this issue are divided.

Additionally, the Court of Appeals, in denying the individual petitioners qualified immunity, failed to consider the specific facts of this case and applied a qualified immunity test which is inconsistent with the



test formulated and applied by other Circuits in Pickering type cases.⁴

Although this case comes before this Court in the context of a motion for summary judgment, the legal issues presented by this case "are sufficiently isolated from the factual controversies so as to make this case a suitable vehicle for review". Saye v. Williams, 452 U.S. 926, 930 (1981) (Rehnquist, J., dissenting from the denial of certiorari in a case involving the application of the Pickering balance); see also, Rankin v. McPherson, 483 U.S. 378, reh. den., 483 U.S. 1056 (1987) (certiorari granted to review the reversal of a grant of

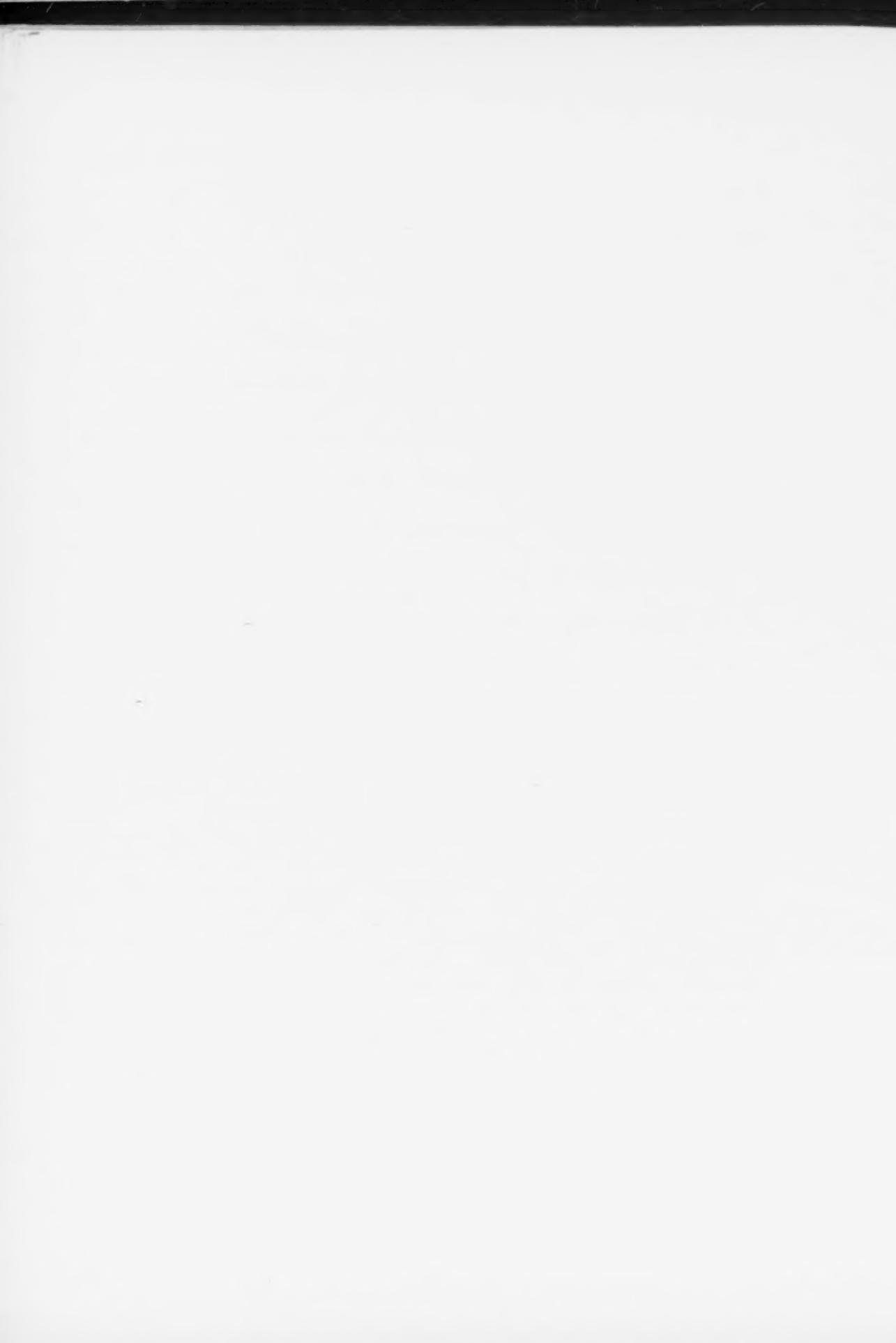
⁴ This Court has not addressed the application of the qualified immunity doctrine to Pickering type cases.



summary judgment in favor of a public employer under the Pickering balance).⁵

Further, this case involves the application of the qualified immunity doctrine, an issue which should be resolved prior to trial. Qualified immunity is immunity from suit, rather than a mere defense to liability and thus, is effectively lost if the case is erroneously permitted to go to trial. See, Mitchell v. Forsyth, 472 U.S. 511, 526-527 (1985).

⁵ Although it is undisputed that the Personnel Department received complaints about Piesco's disruptive comments at meetings with other agencies (i.e., in separate instances, she called the Sanitation Commissioner a "fucking liar" and a high level Police Department official a "liar"), Piesco's allegation that she was terminated in retaliation for her legislative testimony must be accepted as true. Additionally, for the purposes of petitioners' motion for summary judgment, Piesco's allegation that she testified truthfully before the Senate Committee must be accepted as true.



1. The Court of Appeals has effectively conferred absolute first amendment protection to testimony given by high-level public officials before legislative committees.

In determining that Plesco's testimony that a "moron" or a "functional illiterate" could pass the police civil service test was entitled to first amendment protection, the Court of Appeals reasoned that (A46-47):

[a] government employee called to testify before a legislative committee about work-related matters would be confronted with a Hobson's choice. She could either (1) honestly answer the question, in which case, as a matter of law, she could be fired; (2) commit perjury; or (3) refuse to answer the question posed and be held in contempt. ... By offering a government employee the option of jail or unemployment, we would put our imprimatur on chilling speech in a forum where candor is critical to informed decision-making. This we decline to do.

The Court of Appeals has thus indicated its unwillingness to ever permit the



termination of public employees for testimony given before the legislature. Under the Court's reasoning, the state's interest would never outweigh the employee's speech interest regardless of the employee's position, the content of the speech, the confidential nature of his or her disclosure, or the disruptive effect of those comments. Thus, although the Court of Appeals performed a Pickering balance in this case, it afforded such weight to Plesco's legislative testimony that it effectively insulated such speech from the Pickering inquiry.

The insulation of such speech from the Pickering balance is without precedent. It is contrary to this Court's holding that a public employee's first amendment rights are, by necessity, not absolute since the government has a legitimate and significant interest in "'promot[ing] efficiency and integrity in the discharge of official duties,



and to mainta[in][ing] proper discipline in the public service". Connick v. Myers, supra, 461 U.S. at 151 (quoting from Ex parte Curtis, 106 U.S. 371, 373 (1882)).

Further, affording legislative testimony absolute first amendment protection regardless of its content and the interests of the government is also contrary to this Court's direction that the forum of the speech should not be determinative of its protective status. See, Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

Petitioners recognize the importance of the legislative fact-finding function, as well as the employee's interest in testifying before such committees. These factors must and should be considered in determining whether the speech raises matters of public concern and the weight to be accorded such speech in the Pickering balance. See,



Connick v. Myers, supra (whether speech is a matter of public concern is determined not only by its content, but also the form and the context of the speech).

These factors, however, should be balanced against the government's interests.

See, Patteson v. Johnson, 787 F.2d 1245 (8th Cir., 1986). (The Court applied the Pickering balance where a Deputy State Auditor was terminated for testifying before a legislative committee. In striking the balance in favor of the employee, the Court reasoned that the employee had a "legitimate and substantial interest" in testifying truthfully, while the state's interest was "moderate at best" because the working relationships involved were strained before the testimony).

Petitioners submit that there is no reason to confer absolute first amendment protection to legislative testimony since the



Pickering factors adequately protect the interests of the employee as well as the government. The unwillingness of the Court of Appeals to hold public employees accountable for such speech is based on the fallacy that the employee has only three options when called to testify - either to testify truthfully, to lie, or to refuse to answer. High-level policy-making officials, who are testifying on behalf of their agencies, however, have an obligation not only to testify truthfully, but also responsibly. Responsibly means that such officials must give more than a yes/no answer when appropriate, must exercise some judgment in the choice of their words, and must accurately reflect the legitimate concerns of their agencies.

Imposing such a requirement on high-level employees is consistent with this Court's recognition that "[t]he burden of



caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." Rankin v. McPherson, 483 U.S. 378, 390, reh. den., 483 U.S. 1056 (1987). Further, it is permissible to place certain requirements on high-level policy-making officials which could not be required of other public employees because of first amendment concerns. See, Rutan v. Republican Party of Illinois, U.S. __, 110 S.Ct. 2729, 2737, reh. den., __U.S.__, 111 S.Ct. 13 (1990) (political party affiliation is an appropriate requirement for some high-level government positions because of the government's interest in securing employees who will loyally implement its policies).

In sum, the Court of Appeals erred by conferring absolute first amendment protection to Piesco's legislative testimony



and by refusing to impose a requirement upon her to speak responsibly. That requirement if it had been imposed would not have been satisfied in this case.

Piesco's superiors, in consultation with Police Department officials, decided to establish a lower passing grade (85% or 119 correct answers out of 140 questions) than the one advocated by Piesco (89% or 125 correct answers). A policy determination had been made in favor of securing a larger pool of candidates in the initial screening stage. Additionally, the Department was required to minimize the disparate impact on minority candidates. It was irresponsible for Piesco, as Deputy Personnel Director for Examinations, to simply state that it was possible for a "moron" or a "functional illiterate" to pass the examination at the 85% pass mark, without even attempting to



explain what that possibility was,⁶ or the fact that the examination was only the first screening test. See, Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir.), cert. den., 488 U.S. 909 (1988) (speech in the course of an employee's duties will reflect upon the employee's competence to perform his or her job); Hall v. Ford, 856 F.2d 255 (D.C. Cir., 1988) (employee's speech which reflected a policy disagreement with his superiors was a proper basis for dismissal).

⁶ Piesco explained in her affidavit in opposition to petitioners' summary judgment motion that a "functional illiterate" would be able to achieve the passing grade through a combination of knowledge, "wild guessing" and "sheer luck" (CA362).



2. The Court of Appeals' requirement that petitioners must submit evidence of actual disruption to the Department's efficient functioning resulting from Piesco's comments is contrary to Connick v. Myers.

As Deputy Personnel Director for Examinations, Piesco was responsible for advising Ortiz, LaPorte and other City officials on all civil service examinations matters. Thus, in order to perform her duties properly, she was required to maintain a close working relationship of mutual trust and confidence not only with her superiors but also with other City officials. Piesco's comments that a "moron" or a "functional illiterate" could pass the police civil service test undermined the judgment of her superiors and Police Department officials in establishing the passing grade at 85%. Ortiz stated in a memorandum to the Mayor that he considered



Piesco's comments to be irresponsible. At the first departmental meeting after her testimony, when the police examination was discussed, Piesco and Ortiz had a verbal confrontation in which Piesco challenged Ortiz's competency and authority in front of other staff members. Finally, according to Piesco herself, her meetings with Ortiz, LaPorte and other City officials were curtailed after her testimony.

Notwithstanding all of the above undisputed facts, the Court of Appeals found that Piesco's comments had not interfered with the Department's efficient functioning. The Court would not infer the disruptive or potential disruptive effect of Piesco's speech on her working relationships. Rather, the Court held that petitioners were required to submit evidence that Piesco's speech actually interfered with the



Department's operation and the performance of Piesco's duties.

The Court of Appeals' holding is inconsistent with Connick v. Myers, supra, where this Court specifically rejected the argument that once it is determined that the speech raises matters of public concern, the government then has the burden to clearly demonstrate that the speech substantially interfered with the Department's operation.

Id. at 150. In Connick, an assistant district attorney was terminated after she circulated an office questionnaire inquiring, among other things, whether the employees felt pressure from their superiors to work in political campaigns. Although this speech raised matters of public concern, this Court held that the district attorney was not required to "tolerate action which he reasonably believed would disrupt the office, undermine his authority and destroy close



working relationships". Id. at 154. This Court stated (Id. at 151-52):

When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.

Some Circuits, including the Second Circuit in this case, have interpreted the term "a stronger showing" to require evidence of actual disruption where the speech substantially involved matters of public concern. See, e.g., Melton v. City of Oklahoma City, 879 F.2d 706, reh. granted on other grounds, 888 F.2d 724 (10th Cir., 1989); Matherne v. Wilson, 851



F.2d 752, 761 n.53 (5th Cir., 1988); Roth v. Veteran's Administration, 856 F.2d 1401, 1407 (9th Cir., 1988).

Other Circuits, however, have rejected the argument that proof of actual disruption is necessary. These Courts have continued to infer and recognize the potential disruptive effect of the speech from its content and the position the employee holds.

See, e.g., Hall v. Ford, supra, 856 F.2d at 260-261; Germann v. City of Kansas City, 776 F.2d 761, 765 (8th Cir., 1984), cert. den., 479 U.S. 813 (1986).

Although this Court has not specifically addressed this issue since Connick, Justice Scalia, in a subsequent Pickering case involving the termination of a clerk in a County Constable's office, noted that certain statements carry "the clear potential for undermining office relations" and that the Constable has a strong interest in

preventing such comments "regardless of whether the statements actually interfere with office operations . . . or demonstrate character traits that make the speaker unsuitable for law enforcement work."

Rankin v. McPherson, supra, 483 U.S. at 399 (Scalia, J., dissenting in an opinion joined by the Chief Justice, and Justices White and O'Connor).

Petitioners submit that it is obvious that Piesco's comments had a detrimental impact on her working relationships, and that the Court of Appeals' requirement that petitioners must submit evidence of actual disruption beyond that showing is contrary to this Court's holding in Connick.

In sum, the Court of Appeals erred by not affording the petitioners' interest in maintaining the efficient operation of the Department any weight in the Pickering balance. Moreover, if the Court of Appeals



had applied the Pickering factors properly, the balance would have favored petitioners. Piesco's speech interest did not outweigh the Department's interest in insuring its efficient operation and thus, her termination did not violate her first amendment rights.

3. The Court of Appeals failed to consider the specific facts of this case in applying the qualified immunity doctrine.

Petitioners Ortiz and LaPorte are immune from liability since their actions in terminating Piesco did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The Court of Appeals, in denying petitioners immunity, did not inquire whether at the time of Piesco's termination the law was clearly established in relation to the specific facts of this case. Instead, the



Court simply reasoned that "Piesco's statements [were] of such clear public concern that it would not be reasonable for Ortiz and LaPorte to conclude that it was lawful to discharge" her (A53). See also, Vasbinder v. Ambach, 926 F.2d 1333, 1340-1341 (2d Cir., 1991) (in first amendment case, court determined that the law was clearly established without considering the facts of the case).

The Second Circuit's application of the qualified immunity doctrine to Pickering type cases is inconsistent with decisions of other Circuits in which a fact-specific test for the application of the immunity doctrine has been formulated and applied. In Benson v. Allphin, 786 F.2d 268, 276 (7th Cir.), cert. den., 479 U.S. 848 (1986), the Seventh Circuit stated:

[T]here is one type of constitutional rule, namely that involving the balancing



of competing interests, for which the standard may be clearly established, but its application is so fact dependent that the "law" can rarely be considered "clearly established." ... It would appear that whenever a balancing of interests is required, the facts of the existing caselaw must closely correspond to the contested action before the defendant official is subject to liability under [Harlow].

The Fifth and Tenth Circuits have also adopted a standard whereby the public employer is generally entitled to immunity unless the official was on notice from decisions in cases with analogous facts and in which the necessary Pickering balance had been performed. See, Noyola v. Texas

⁷ The Court noted, however, that immunity would be unavailable even in the absence of decisional law where the public employer's conduct was so egregious that "the result of the balancing test will be a foregone conclusion." 786 F.2d at 276, n.18.



Department of Human Resources, 846 F.2d 1021 (5th Cir., 1988); Melton v. City of Oklahoma City, 879 F.2d 706, reh. granted on other grounds, 888 F.2d 724 (10th Cir., 1989).

Petitioners in this case were not on notice in 1985 that Piesco's speech interest outweighed the Department's interest in ensuring its efficient operation and that therefore, her termination would be unlawful. See, Guercio v. Brody, 911 F.2d 1179, 1184 (6th Cir., 1990), cert. den., U.S., 111 S.Ct. 1681 (1991) (the relevant inquiry is not whether the Pickering balance was clearly established, but whether the employee's rights under the Pickering balance were clearly established).

Petitioners are aware of only one other case involving the application of the Pickering balance to a termination of an employee for legislative testimony. Patteson

v. Johnson, 787 F.2d 1245 (8th Cir.), cert. den., 479 U.S. 828 (1986). Although the balance was struck in the employee's favor in that case, it did not put petitioners on notice with respect to Piesco's termination. First, the decision of the Court of Appeals was not decided until after Piesco's termination (the District Court case is unreported). Moreover, the comments of the Deputy State Auditor did not have any disruptive effect because his relationship with the State Auditor in Patteson was already strained.

Finally, in Patteson, although the Court determined that the employee's first amendment rights had been violated, it found that the State Auditor was entitled to qualified immunity because the law was not clearly established at the time of the employee's termination.



Similarly, in this case, since it was not clearly established at the time of Piesco's termination that her discharge would violate her first amendment rights, Ortiz and LaPorte are entitled to qualified immunity.



CONCLUSION

THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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